No. 91-948

In The

Supreme Court of the United States

October Term, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC. and ERNEST PICHARDO,

Petitioners,

v.

CITY OF HIALEAH,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

Brief Amicus Curiae Of Americans United For Separation Of Church And State, James Andrews As Stated Clerk Of The General Assembly Of The Presbyterian Church, (U.S.A.), The American Jewish Committee, The American Jewish Congress, The Anti-Defamation League Of B'nai B'rith, The Baptist Joint Committee On Public Affairs, The Catholic League For Religious And Civil Rights, The Christian Legal Society, The Church Of Jesus Christ Of Latter-Day Saints, The Evangelical Lutheran Church In America, The First Liberty Institute, The General Conference Of Seventh-day Adventists, Home School Legal Defense Association, Mennonite Central Committee U.S., The National Association Of Evangelicals, And People For The American Way, In Support Of Petitioners

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QUESTIONS PRESENTED

Whether city ordinances specifically directed at the sacrifice of animals in a religious ritual, while permitting the killing of animals for such other purposes as food, science, convenience, or sport, violate the Free Exercise Clause of the First Amendment.

Whether the Court should reconsider its teaching in *Employment Division v. Smith* that the Free Exercise Clause protects only against official discrimination against an unpopular minority such as that manifested here, and does not protect the substantive liberty of each American to worship in the manner and season most agreeable to the dictates of his own conscience, subject only to the overriding responsibility of the state to maintain public peace and safety.

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INTERESTS OF AMICI CURIAE

Amici curiae are religious organizations or civil rights organizations that defend against constitutional infringement of the first of our civil liberties protected under the First Amendment, religious freedom. None of the *amici* espouses or endorses the doctrines or practices of petitioners, and many of the *amici* consider those practices repugnant for moral and religious reasons. Nonetheless, *amici* are committed to the proposition that all sincere religious practices are presumptively entitled to the protection of the Constitution, within only those limits that are required for the protection of the public welfare. We are convinced that the lower court decisions in this case did not live up to this standard. In the words of the Williamsburg Charter, a bicentennial document celebrating religious liberty, "Rights are best guarded and responsibilities best exercised when each person and group guards for all others those rights they wish guarded for themselves." *Williamsburg Charter*, reprinted in 8 J. Law & Relig. 5, 18 (1990).

This is a case of particular importance to *amici* and other religious organizations because it offers this Court the first opportunity to clarify its teaching in *Employment Division v. Smith*, 494 U.S. 872, 877-878 (1990) that banning acts only when they are engaged in for religious reasons – in short, religious discrimination – is most strenuously prohibited under the Free Exercise Clause.

The particular statements of interest of the *amici curiae* are included in Appendix A. The letters from the parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 36.2.

SUMMARY OF ARGUMENT

This case involves a series of ordinances passed by the City Council of Hialeah, Florida, in June and September, 1987. These ordinances were specifically enacted for the purpose of halting petitioner's exercise of religion and mode of worship – the ancient practice of ritual sacrifice of animals on special occasions of religious significance – within the precincts of Hialeah. The ordinances challenged here do not take the form of a generally applicable norm from which the petitioners seek special exemption. Neither Hialeah nor the State of Florida generally prohibits the killing of animals. Anyone can kill an animal in Florida for sport, food, convenience, or profit; but they cannot kill an animal as an exercise of religious worship. One can get Chicken McNuggets® in Hialeah, but one may not partake of chicken roasted at a religious service of the Santería faith.

The reasons invoked by the City relate to cruelty to animals, public health, and zoning. But neither Hialeah nor the State of Florida prohibits the killing of animals under secular circumstances that raise identical (or even more serious) concerns of cruelty, public health, or zoning. The ordinances are thus "specifically directed at [petitioners'] religious practice" and are therefore unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 878 (1990).

Amici wish to make four related points. First, the practice of animal sacrifice, though contrary to the religious convictions of many, is an ancient, long-standing, well-established, sincere religious practice. Indeed, the sort of animal sacrifice practiced by the Church of the Lukumi Babalu Aye is not dissimilar to the practices ordained for the people of Israel by the Holy Bible and

the people of Islam by the Qur'an, although the underlying theological bases for the practices are quite different. Second, the court of appeals ignored the teaching of this Court that the Free Exercise Clause requires governmental neutrality toward religion. Although the district court expressly found that "the ordinances are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah," Pet. App. 23, it nonetheless upheld the ordinances.[1] Third, the purported governmental interests invoked by the district court are insufficient as a matter of law because they do not justify the disparate treatment meted out to those who kill animals out of obedience to religious command and those who kill animals for food, science, pest control, animal population control, or sport. Fourth, *amici* wish to identify for this Court some of the shoals endangering religious freedom that lie along the new course of First Amendment analysis that this Court has charted in *Smith*. As this case illustrates, after *Smith* lower courts have often demonstrated indifference to the impact of government action against vulnerable religious minorities, even when it takes the form, as in this case, of invidious discrimination or overt hostility. As this Court considers the future course of constitutional doctrine in the area of religious freedom, *amici* wish the Court to be aware of the practical consequences of constitutional rules that turn a blind eye toward the realities of official treatment of unfamiliar and unpopular religious groups, particularly

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[1] Reference is frequently made in this brief to the opinion of the district court because the court of appeals largely adopted the analysis of the district court in an unpublished per curiam order. Pet. App. 2.

at the local level. In the view of the *amici*, the history and purpose of the Free Exercise Clause requires that it be construed to provide maximum freedom for religious practice consistent with the demand of public order.

ARGUMENT

I. THE CHALLENGED ORDINANCES FORBID SINCERE RELIGIOUS PRACTICES THAT ARE INTEGRAL TO LONG-ESTABLISHED AND SINCERELY HELD RELIGIOUS BELIEFS

This case concerns the religious practices and beliefs of the Church of the Lukumi Babalu Aye and its members in Hialeah, Florida. The church and its members practice a religion known as Santería, a syncretistic branch of a millennia-old West African religion known as Yoruba or Yoba. The descendants of West African slaves in Cuba and other Latin American countries blended the beliefs and practices remembered from their ancient homeland in Africa with names and symbols taken from the folk piety of the Roman Catholic Church. It is not, however, a "branch" of Catholicism. For example, ancient Yoruba gods were given the names of Catholic saints (hence the name of the adherents, *santeros*, and of the religion, Santería). *See* Joseph Murphy, "Santería," 13 *Encyclopedia of Religion* 66 (Mircea Eliade ed. 1987).

Santería was officially persecuted in Cuba by Spanish and post-colonial authorities, as it is by the current regime; but the religion persisted underground for some 400 years and spread throughout the Caribbean. Santería came to this country with Cuban exiles who fled the Castro regime. There are over 50,000 adherents of Santería in southern Florida, and many more adherents of

this faith in the New York metropolitan area. In its various forms, there are probably a hundred million believers worldwide.

Although personally and religiously abhorrent to many Americans, animal sacrifice remains an integral part of the Santería religion, and of other religions, including Islam, around the world. In Santería, small animals are sacrificed in connection with many important rituals, such as birth, marriage and death rites. It is essential in the rite of initiation of new priests of the faith, known as *babalawos*. It is likewise at the heart of the *santeros'* concept of communion or spiritual relationship with the sacred spirits known as *orishas*; this communion is established through the symbolism of shared food, including cakes, fruits, and parts of a sacrificed animal. "The slaughter is always performed quickly and cleanly according to ritual rules, and the flesh is nearly always cooked and consumed by the congregation as part of the *orisha's* feast." Murphy, "Santería," *id.*

The roots of the practice of animal sacrifice are at least 4,000 years old. They lie in the ancient history of what are now Judaism, Christianity, and Islam. Indeed, the practices that Hialeah seeks to prohibit are virtually indistinguishable with the practices of animal sacrifice mentioned throughout the Bible. *Leviticus* 1-7 (the requirements in Torah for animal sacrifice); *I Kings* 8:62-66 (animal sacrifice at the dedication of Solomon's temple); *see* Roland deVaux, *Ancient Israel: Its Life and Institutions* 415-23 (1961); Roland deVaux, *Studies in Old Testament Sacrifice* (1964); Gaster, "Sacrifices and Offerings, OT," in 4 *Interpreter's Dictionary of the Bible* 147-59 (1962) (collecting and discussing Biblical texts referring to animal sacrifice). In Islamic faith the indiscriminate

killing of animals for sport is prohibited in the *Hadith* (Sayings of the Prophet Muhammad), but the ritual sacrifice of animals is sometimes required. For example, on the festival known as *Íd al-Adha*, devout Muslims throughout the world join the pilgrims in Mina in sacrificing a small animal in remembrance of the sacrifice of a ram by Abraham in place of his son Ishmael. The roasted flesh of the sacrificed animal is distributed to the poor for them to eat. *The Qur'an* 37:102; *see* Glassé, "Íd al-Adha," "Sacrifice," *The Concise Encyclopedia of Islam* 178, 340 (1989); Schimmel, "Islamic Religious Year," 7 *Encyclopedia of Religion* 456 (Mircea Eliade ed. 1987).

Profound theological reasons – having nothing to do with cruelty to animals – explain why animal sacrifice was abandoned in the first century of the common era by Jews and Christians. But those theological reasons do not bind the Church of the Lukumi Babalu Aye and must not be imposed upon them. In the Jewish faith, sacrifice was abandoned when the Romans destroyed the Second Temple in 70 C.E.,[2] but some Jewish authorities maintain that

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[2] Worship in ancient Israel occurred at several shrines. After the reform initiated under King Josiah (640-609 B.C.E.), however, the priestly and sacrificial functions were exclusively tied to the Jerusalem Temple and could not be performed elsewhere (*Deut.* 12:1-13). The Temple of Solomon was destroyed by the Babylonians in 587 B.C.E., but rebuilt after the return from the exile in 535 B.C.E. (*Ezra, Nehemiah,* and *Haggai*). The Romans destroyed this Second Temple in 70 C.E., again making the priestly practices, including the sacrifices, impossible, as they remain to this day. Samaritans, who claim to represent the northern tribes of Israel and who believe that Mount Gerizim rather than Mount Zion is the proper center of religious devotion, continue the ancient practice of sacrificing the passover lambs at that location to this day.

sacrifice must be resumed in some form if and when the Temple is restored. *See* Day, "Sacrifice," 14 *Encyclopedia Judaica* 614-15 (1971). In the initial stage of the early Christian church, little thought was given to differentiating the new religion from Judaism; thus the Christians in Jerusalem "went to the Temple every day" (*Acts* 2:46), perhaps continuing the same participation in animal sacrifice that was practiced by Jesus, Mary, and Joseph (*Luke* 2:22-24). At least by the year 70, however, the practice of animal sacrifice among Christians was abandoned not simply because the Temple was destroyed in that year, but also because of the theological view that further sacrifice was rendered forever unnecessary by the ultimate sacrifice of the pure Lamb of God on the cross at Calvary (*Letter to the Hebrews* 7:27; 9:1-23; 10:1-10; *I Peter* 1:18-19; *I John* 1:7; 2:2; *Rev.* 5:9; 7:14; 12:11).

These theological developments make many in the Christian and Jewish faiths reluctant to defend a practice today that is so foreign to their own doctrines. But the sensibilities of the majority are no test of religious truth, and members of minority religions have no less right to practice their faith merely because others recoil from it. The City, the State Attorney General, and the district court have no business labeling any religious practice "unnecessary" for a particular religious tradition. The City may have valid, if not compelling, health and safety concerns that could support a generally applicable ordinance regulating all killing of animals. But that is vastly different from telling a religious body whether its age-old religious practices are "necessary." Viewed from the only perspective permitted under the First Amendment – that of the Santería adherents – sacrifice is a vital and indispensable component of their worship.

Petitioners are not asking for public support or endorsement for their beliefs. They ask only to be left alone to practice their rituals as they have been extant for 4,000 years. To use the words of James Madison, principal author of the First Amendment, petitioners ask only for the "equal right of every citizen to the free exercise of his Religion according to the dictates of conscience." Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 15, reprinted at 330 U.S. 63, 71.

II. THE ORDINANCES UNDER CHALLENGE ARE UNCONSTITUTIONAL BECAUSE THEY ARE SPECIFICALLY DIRECTED AT A RELIGIOUS PRACTICE AND ENTANGLE THE CITY IN THEOLOGICAL JUDGMENTS

As the district court acknowledged, the ordinances under challenge "are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah." Pet. App. 23. For this reason alone they are unconstitutional.

Ordinance 87-71 prohibits animal "sacrifice" in "a public or private ritual or ceremony not for the primary purpose of food consumption." As the language of the Ordinance shows, the killing of animals is not illegal in Hialeah: only the killing of animals in a "ritual or ceremony" is illegal. The ordinance is "specifically directed at [petitioners'] religious practice" and is therefore unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 878 (1990). Indeed, this ordinance cannot be distinguished from an example given by this Court in *Smith*:

> It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Id. at 877-878. The Hialeah ordinance may be contrasted with the Oregon anti-drug law upheld in *Smith*. The Oregon law applied to everyone, and this Court held that no exception was required for the Native American Church. Here, the Ordinance applies to no one *except* those involved in rituals and ceremonies. Religion is "singled out."[3]

The rule against laws specifically directed at religious practices has a strong basis in the history of the Free Exercise Clause. The writings of John Locke on religious toleration, which were closely studied by Thomas Jefferson, are generally regarded as stating the minimum content of the Free Exercise Clause.[4] Indeed, even those scholars who have espoused a narrow interpretation of the rights protected by the Free Exercise Clause have relied on Locke as their primary authority.[5] Locke wrote: "Whatsoever is lawful in the commonwealth, cannot be

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[3] It is no answer to say that there may hypothetically be some nonreligious rituals or ceremonies to which the ordinance might apply. No such occasions have occurred in Hialeah, and it is undisputed that the ordinance was adopted in specific response to the petitioners' announcement of the opening of a church. Pet. App. 22-23.

[4] *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430-37, 1443-49 (1990).

[5] *E.g.*, Walter Berns, *The First Amendment and the Future of American Democracy* (1985); Michael Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978).

prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses." Locke, "A Letter Concerning Toleration," 35 *Great Books of the Western World* 13 (Robert Hutchins ed. 1952). Indeed, as if anticipating this very case, Locke specifically defended the right to animal sacrifice so long as animals were killed for food: "if any people congregated upon account of religion should be desirous to sacrifice a calf, I deny that that ought to be prohibited by a law. . . . [W]hat may be spent on a feast may be spent on a sacrifice." *Id.* at 12-13. The ordinances here cannot be upheld without rejecting the clear historical understanding of the Free Exercise Clause and the view of the founders that religious freedom is an inalienable right. *See* Declaration of Independence, 1 Stat. 1 (1776); Madison, *Memorial and Remonstrance*, ¶ 1, reprinted at 330 U.S. 1, 64.

Ordinance 87-52 is unconstitutional for the same reason. Paragraph 1 forbids any person to sacrifice or slaughter certain animals "intending to use such animals for food purposes." Paragraph 2 includes within the ban "any group or individual that kills, slaughters or sacrifices animals for any type of ritual," whether or not the flesh is consumed. Paragraph 3 exempts licensed slaughterhouses and other uses permitted under state and local law. When the fog clears, the only killing of animals this ordinance prohibits is that for religious purposes.

Ordinance 87-72 forbids the "slaughter" of animals except in licensed slaughterhouses or by individuals or groups who slaughter "small numbers of hogs and/or cattle." This ordinance is susceptible to more than one

interpretation. Many persons in Hialeah kill animals for various purposes, including for food, but are not deemed to fall within the strictures of the ordinance (apparently because the killing is not in large quantities or for commercial purposes). For example, hunters kill animals for domestic consumption or for the sport of it, and fishermen kill fish for the same reasons, but their actions are not deemed to fall within the ordinance. Like hunters and fishermen, petitioners kill animals and often eat them, but they do not do so in large quantities or for commercial purposes. Either the ordinance does not apply to petitioners' church, which does not slaughter animals commercially for food, or the ordinance has been applied on a discriminatory basis, in violation of *Smith*. *See* Pet. at 14.

Moreover, if petitioners are deemed to be engaged in the "slaughter" of animals during their rituals, and thus subject to Ordinance 87-72, they are protected under Florida state law, which specifically allows "ritual slaughter." Fla. Stat. Ann. § 828.22(3) (1985). The Florida Attorney General has opined that petitioners are not protected by this statute because they are engaged in "sacrifice" rather than "slaughter," and that the exemption for ritual slaughter applies only to "the killing of animals for food." Fla. Att'y Gen. Opin. 87-56, Annual Report 146, 149 (1987). The Florida authorities cannot have it both ways. Either petitioners' activity constitutes "slaughter" and is protected under state law, or it does not, in which case Ordinance 87-72 does not apply.

Ordinance 87-40 provides that anyone who "unnecessarily . . . kills any animal . . . in a cruel or inhumane manner, is guilty of a misdemeanor." This ordinance presents two constitutional problems.

First, the government has no legitimate authority, under the First Amendment to determine whether religious rituals are "necessary." Such a determination could mean only one of two things: either some religious rituals are "necessary" and some are not; or that religious activities in general are "unnecessary." Either way, the judgment is unconstitutional. To the members of the Church of the Lukumi Babalu Aye, the sacrifice of animals is as necessary as participation in the Passover Seder is to an observant Jew. The government has no authority to gainsay this theological judgment, or to favor one tradition of worship over another. But if religious activities – unlike secular activities such as food gathering or sport – are automatically deemed "unnecessary," this constitutes discrimination against religion of the very sort condemned in *Smith*. It treats religion as a mere whim, automatically subordinate to what the secular world considers "necessary."

In this respect, the ordinance is indistinguishable from the state law struck down in *Sherbert v. Verner*, 374 U.S. 398 (1963), as reaffirmed and interpreted in *Smith*, 494 U.S. at 883. In *Sherbert*, the state disallowed unemployment benefits if the worker refused suitable employment "without good cause." The state did not include religious objections in the variety of reasons within this "good cause" provision. This Court held that the state's refusal to include religious reasons within the universe of "good cause" was unconstitutional. As the Court stated in *Smith*, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to

extend that system to cases of 'religious hardship' without compelling reasons." 494 U.S. at 884. In this ordinance the City allows the killing of animals (even "in a cruel or inhumane manner") where the killing is "necessary." This requires an individuated determination of "necessity." Having set up such a system, the City may not categorically refuse to extend it to cases of religious necessity.

The second constitutional problem with Ordinance 87-40 is that its prohibition of "cruel or inhumane" methods of killing has been defined in a discriminatory fashion. As the evidence below showed, petitioners' method of animal sacrifice is quick in almost all cases. R 12-891 (testimony of Dr. Fox, National Vice-President of Humane Society of the U.S.). The district court, however, credited testimony that there is "no guarantee" that this will always be the case. Pet. App. 13. This requirement of an iron-clad "guarantee" of humaneness is imposed on no other form of animal killing. The City allows other forms of killing, including hunting and extermination, that are far more likely to cause pain and fear in animals in a far greater number of cases. Religion alone is subjected to this standard. The district court required the petitioners to prove that no serious risk of harm would result from their worship services. Pet. App. 13, 45-46, 46 n. 59, discussed in Petitioner's Brief at 35-36. The burden of demonstrating harm, however, falls on the government, not a religious claimant. The district court thus inverted the entire concept of who is supposed to be restrained by the Free Exercise Clause from doing what and to whom.

Accordingly, each of the ordinances under challenge is constitutionally flawed. One prohibits a religious practice on its face (Ord. 87-71). Two more do so by interpretation of their terms (Ord. 87-40 and 87-52). And the fourth does so by discriminatory application of commercial regulations to a noncommercial religious practice (Ord. 87-72). If the City wishes to pursue legitimate public policy objectives, it must do so in a constitutional manner. While *amici* do not know what form future legislation might take, we suspect that the City might be forced to reconsider how powerful its interests are in this matter if it has to apply the same rules to hunting and other socially acceptable forms of killing that it applies to this unfamiliar and unpopular minority religion.

III. THERE IS NO COMPELLING GOVERNMENTAL INTEREST SUPPORTING THE DISCRIMINATION AGAINST RELIGION IN THIS CASE

Once it is recognized that the Hialeah ordinances are neither neutral (in purpose or effect) nor generally applicable, it is evident that they can be upheld only if they are the least restrictive means of attaining a compelling governmental purpose. Under *Smith*, this most exacting standard of judicial review is reserved under the Free Exercise Clause for laws that single out religion for a discriminatory prohibition. Indeed, one of the reasons the Court narrowed the range of free exercise claims in *Smith* was to ensure that the compelling governmental interest standard is not "water[ed] down" but rather "really means what it says." 494 U.S. at 888. Thus, to override a free exercise claim a governmental interest must be truly "compelling" – that is to say, necessary and of the highest order. *Id.* No ordinary governmental interest will do.

In *Smith*, this Court reaffirmed that a strict requirement of nondiscrimination is the core of the Free Exercise Clause. As Justice Jackson observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

In the two years since the *Smith* decision, the lower courts have gotten the message that the scope of application of the Free Exercise Clause has been constricted, but they have not shown any sign of understanding that, within this narrowed field, the degree of protection has been intensified. Rather, as this case exemplifies, the courts have engaged in a wholesale retreat from protection for Free Exercise rights. *Amici* therefore urge the Court to use the opportunity of this case to reaffirm the protective side of the *Smith* approach: that within the field of laws discriminating against religion, the very strictest of judicial scrutiny will apply.

The district court purported to find the City's interest in enforcing the ordinances against animal sacrifice "compelling," Pet. App. 43-45, but the haphazard and undemanding way in which it went about this analysis robbed the compelling interest test of its extraordinary force. The court cited and credited a number of plausible connections between petitioners' religious practices and legitimate governmental interests, such as public sanitation, humaneness toward animals, and zoning criteria. But *never* did the court explain, in all its analysis, why petitioners' practices pose *more* of a threat to these interests than other activities that take place daily and legally within the confines of Hialeah.

In a claim of discrimination against religion, the question is not whether the law has a compelling purpose in the abstract, but whether the distinction drawn between religious and secular activities serves a compelling interest. *Amici* doubt that the government *ever* could have a compelling interest in forbidding for religious purposes an activity it permits for other purposes. Certainly no such interest was demonstrated here. There are many secular activities that pose the same (or worse) threat to the government's interest than is posed by petitioners' religious services. Unless the City can justify singling out religion for peculiar burdens (and it has not even tried), the ordinances must be struck down.

IV. GOVERNMENT AGENCIES AND LOWER COURTS HAVE MISREAD *SMITH* TO CONDONE OFFICIAL HOSTILITY TO RELIGION

This is the first free exercise case to reach this Court since the decision in *Smith*. Petitioners have not asked this Court to reconsider *Smith*, and *amici* are confident that petitioners should prevail even under the constitutional doctrine announced in *Smith*. We nonetheless wish to inform the Court that religious and civil liberties communities, across the spectrum of theological and political opinion, are united in the conviction that *Smith* was wrongly decided,[6] not only because it has had consequences that we believe were unintended and unanticipated, but also because it radically diminished the substantive liberty of each American to worship in the manner and season most agreeable to the dictates of his

[6] The procedure in *Smith* was unusual; the question decided was neither presented nor briefed by either side.

own conscience, subject only to the overriding responsibility of the state to maintain public peace and safety. The Free Exercise Clause, we believe, is more than just a specialized "equal protection clause" for the relatively unusual cases (like this one) in which the government actively discriminates against an unpopular minority religion, or religion in general.

An understanding of the debate engendered by the *Smith* decision is relevant to the Court's disposition of this case in three respects. First, the *Smith* opinion expressly left open several exceptions. The areas in which the previously articulated doctrine of compelling governmental interests remains in effect include: "hybrid" cases involving the Free Exercise Clause in conjunction with other constitutional protections, 494 U.S. at 881-82, cases involving internal church disputes regarding doctrine or authority, *id.* at 877, and cases involving "individualized governmental assessment of the reasons for the relevant conduct," *id.* at 884.[7] In future litigation in this and the lower courts, these exceptions could either expand or contract, depending in part on this Court's perceptions of how *Smith* is actually working in government agencies and in the lower courts. If *Smith* in practice is rendering important freedoms vulnerable to government interference, the Court must be aware of that in determining the reach of *Smith* and the scope of its exceptions.

Second, the state and lower federal courts respond not merely to the precise legal doctrine reflected in the holdings of this Court, but also to their own perceptions

[7] For a detailed analysis of these exceptions, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 41-54.

of the Court's purpose and direction. As we will explain below, the lower courts have interpreted *Smith* as requiring or inviting a radical withdrawal of constitutional protection for religious freedom, beyond anything this Court could likely have expected. This Court should be aware of that fact, so that it will be able to take corrective steps, beginning with this case.

Third, the history of this Court's doctrinal development shows that the coherence and durability of new constitutional doctrine is tested against the realities of subsequent cases in the field. Where the new doctrine receives responsible criticism and is seen to produce results at odds with our constitutional traditions and aspirations, the Court has demonstrated its willingness to reconsider its approaches. We hope that this case will initiate that process.

The circumstances of *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943), are instructive. At the time of the second flag salute case, the Justices were aware of the campaign of repression directed against the Jehovah's Witnesses in the wake of this Court's first flag salute case, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), including the application of "generally applicable" taxes, licensing laws, and regulations of door-to-door solicitation to the Witnesses in order to drive them out of a state. All of this was accompanied by waves of violent attacks on the Witnesses both by the police and by vigilante mobs. *See* Peter Irons, *The Courage of Their Convictions* 22-23 (1988). In this setting the *Barnette* Court overruled *Gobitis*. In *Barnette* Justice Robert Jackson proclaimed a vision of freedom in these ringing terms: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to

place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Id.* at 638. It would be a step backward if this Court were to abandon *Barnette* and return to the narrow confines of *Gobitis*. *See Smith*, 494 U.S. at 902 (O'Connor, J. concurring).

a. Free Exercise in the lower courts after Smith. An evident premise of the *Smith* decision was that the protection accorded by the previously articulated compelling interest test was exceptional and mostly unnecessary, because freedom of religion in this country is protected largely by traditions of toleration respected in the democratic process. But this case illustrates graphically that traditions of toleration give way all too easily to majoritarian passions when strange and unfamiliar religious practices are at issue. *Late Corporation of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). Neither the ancient roots of animal sacrifice nor its observance by millions of Muslims and of Santería adherents throughout the world today was very impressive to the government in Hialeah. Indeed, to witnesses supporting the ordinances the regulation was needed to bar "paganism" from Florida. R 8, at 81-82; Pl. Ex. 10, at 4. Asking the *santeros* to look to the Hialeah City Council for relief is like sending the Jehovah's Witnesses to the Minersville School Board. *See* John Noonan, *The Believer and the Powers that Are* 233-55 (1987); David Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* (1962).

Lower court cases since *Smith* demonstrate that local governments often have little or no respect for sincere religious convictions at odds with the sensibilities or preferences of the majority, and that an antidiscrimination principle is not sufficient to shield the exercise of

religion from the intolerance of majorities and the inflexibility of bureaucrats. In *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990), for example, a religious hospital was compelled to teach all residents how to perform abortions. The district court concluded that this outrageous invasion of conscience was in service of a "compelling" governmental interest. What is most striking about the case is that state officials did not even consider a belief so deeply and widely held as conscientious objection to performing abortions, ignoring this Court's suggestion that the political branches should provide free exercise exemptions. In the face of this remarkable insensitivity, the court was powerless to supply a remedy.[8]

In a little publicized case, the City of New York recently invoked handicap access regulations to close down a shelter for the homeless operated by Mother Teresa's religious order. The shelter was on the second floor of a walk-up. The nuns offered to carry any handicapped they encountered upstairs, but the City would brook no exception to its "neutral" rules requiring an elevator in homeless shelters. The City should have taken the prize for the most frivolous governmental interest ever asserted against a religious body engaged in charitable activity – the view that it is better for the homeless to sleep in the street than in a building without an elevator. Under *Smith* analysis, the State did not need any reason; even a frivolous "generally applicable" rule was enough to shut down a religious mission. The bureaucracy won,

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[8] See *Doe v. Bolton*, 410 U.S. 179, 184, 205 (1973) (upholding conscience clause protecting doctors and nurses who refuse to participate in abortions).

and the nuns and the homeless lost. *See* Sam Roberts, *Fight City Hall? Nope, Not Even Mother Teresa*, New York Times, Sept. 17, 1990, at B1, col 1.

In *Hunafa v. Murphy*, 907 F. 2d 46 (7th Cir. 1990), a court of appeals remanded a suit by a Muslim state prisoner who had protested the practice of slopping pork onto his plate so that he was unable to eat the remainder of the prison meal. The court indicated, however, that the intervening decision in *Smith* may have undercut the legal basis for the prisoner's claim: *Smith* "had cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences." *Id.* at 48.

In *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), a generally applicable, facially neutral law requiring autopsies was applied to the son of a Conservative Jew, for whom the defilement of the body is a sacrilege, and for whom burial must take place at least before sundown on the day after the death. Since the man had died in an auto accident, that should have satisfied whatever interest the government might have in ascertaining the cause of death of its citizens. *See also You Vang Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990), *reconsidered and dismissed*, 750 F. Supp. 558 (D.R.I. 1990) ("regretfully" reversing on the basis of *Smith* its earlier determination that the government was required to accommodate the religious objection of Vietnamese Hmong to autopsies). In both cases, a mechanical approach to "generally applicable" norms was allowed to trump a sincerely held religious tenet, in a manner that was manifestly not the least restrictive alternative means of effectuating a governmental interest that was not very strong.

After becoming aware that they no longer have a constitutional obligation to accommodate minority religious convictions, governmental agencies have typically pursued the bureaucratic imperative without regard to contrary religious interests, belying the promise in *Smith* that the political branches of government can safely be trusted to respect the value of protecting the first of our civil liberties. Even a well intentioned legislature may frequently be unaware of the impact of its laws on unfamiliar faiths, and the press of business in the legislatures makes legislative remedies an uncertain source of protection.

At the local level, zoning laws have been invoked – as they were here – both to prohibit a church from beginning its ministry at all and even to regulate the number of persons to whom a church may minister. *See Bethel Evangelical Lutheran Church v. Village of Morton*, 201 Ill. App. 3d 858, 559 N.E. 2d 533, appeal denied, 135 Ill. 2d 554, 564 N.E. 2d 835 (1990); R. Niebuhr, "Here Is The Church," *Wall Street J.*, Nov. 20, 1991, at A1, col. 4. Zero-population growth may be desirable in a particular local community, but the application of this policy to a church's spread of the gospel is the clearest example imaginable of governmental overreaching.

At the federal level, one agency even construed *Smith* to allow – or worse yet, to require – the revocation of a religious exemption from requirement of wearing hard hats on construction sites. OSHA Notice CPL 2 (Nov. 5, 1990). This administrative decision – temporarily lifted under congressional pressure – exemplifies the bureaucratic impulse to enforce all laws to the limit of their logic, without regard for their impact on religious minorities.

This bureaucratic tendency has even led officials in the Justice Department to extend the reach of *Smith* to "generally applicable" norms of oppressive foreign regimes. In its training manual dealing with asylum for refugees claiming a well-founded fear of persecution, the INS characterizes *Smith* as supporting an "[a]lien's obligation to obey general law, notwithstanding religious objection." Dep't of Justice, Immigration and Naturalization Service, *Basic Law Manual Asylum: A Training Manual for Immigration and Naturalization Officers* 37 (1991). The "tempest-tossed yearning to breathe free" may evidently be denied asylum if a government attorney couches their experience of religious persecution abroad in facially neutral terms. This Court surely did not have in mind complicated asylum claims when it decided *Smith*, but that case is now being invoked to assert the tautological, Statist claim that a foreign government may "seek to punish conduct it may lawfully forbid." *Id.*

Unless *Smith* is corrected, Roman Catholic children will no longer have a right of excusal from sex education classes in public schools contrary to their religious teaching; no longer will churches have a free exercise right of exemption from employment laws forbidding discrimination against homosexuals when they choose their minister or music director; no longer will doctors or nurses be able to assert a religious ground for declining to participate in compulsory training or participation in abortion procedures; no longer will the confidentiality of the confessional be constitutionally protected when prosecutors call the priest as a witness in court; no longer will Jewish prisoners be entitled to kosher meals; no longer will religious schools be able to invoke the Free Exercise Clause to shield themselves from accreditation standards

applicable to secular public schools; no longer can Jehovah's witnesses avoid jury service, can Christian Scientists avoid unwanted medical care, or Jewish college students avoid exams scheduled on high holidays.[9] All these are relegated to their political remedies, despite the manifest tendency of the political process to favor the mainstream over the heterodox.

The problem with the "general applicability" standard is that general laws are enacted in accordance with the mores of the bulk of the population, frequently

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[9] None of these cases are hypothetical. All are real. *See Smith v. Ricci*, 89 N.J. 514, 446 A. 2d 502 (1982), *Medeiros v. Kiyosaki*, 478 P. 2d 314 (Hawaii 1970) (sex education); *Walker v. First Orthodox Presbyterian Church of San Francisco*, 22 FEP Cases 762 (Cal. Super. Ct. 1980) (church may decline to hire gay organist); Cole Durham, Mary Anne Wood, and Spencer Condie, *Accomodatino of Conscientious Objection to Abortion: A Case Study of the Nursing Profession*, 1982 Brigham Young L. Rev. 253 (citing cases), *but see St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990); *People v. Philips* (N.Y. Ct. of Gen. Sessions 1813), reprinted in *Privileged Communications to Clergymen*, 1 Cath. Lawyer 199 (1955) (confidentiality of confession); *Kahane v. Carlson*, 527 F. 2d 492 (2d Cir. 1975) (kosher meals for prisoners); *Kentucky State Bd. for Elementary & Secondary Ed. v. Rudasill*, 589 S.W. 2d 877 (Ky. 1979) (state constitutional protection of religious schools); "Presbyterian Seminary Faces Catch-22 on Accreditation," *Washington Post*, Apr. 20, 1991, at G 11; *In re Jenison*, 375 U.S. 14 (1963), on remand, 267 Minn. 136, 125 N.W.2d 588 (1963) (jury duty); *Walker v. Superior Court*, 47 Cal. 3d 112, 763 P. 2d 852 (1988) (prosecution of Christian Scientist for manslaughter for failure to provide medical care to child does not violate federal Free Exercise Clause); "Professor Criticized for Exam on Yom Kippur," *New York Times*, Oct. 14, 1989, § 1, at 26, and Steve Jacobson, "Edwards Needs Sensitivity," *Newsday*, Nov. 10, 1989, at 165 (professor at state university refused to reschedule exam or allow make-up exam for Jewish students).

without any consideration of their impact on minority religions. In light of the close connection between majoritarian mores and religious norms, the requirement that a law be "generally applicable" is not, and cannot be, a guarantee of neutrality. It is at most a guarantee that the laws will conform to the norms of mainstream belief.

Sometimes a facially neutral law does not even reflect majority norms. Legislation is often driven by interest group pressures, and narrow but determined interest groups may push through generally applicable legislation deeply hostile to religious needs. The most obvious contemporary examples of this phenomenon are the battles between the pro-choice and gay rights movements, on the one hand, and Roman Catholics, Orthodox Jews, and conservative Protestants on the other. *See* Richard Duncan, *Gay Rights: A Scud Attack on Religion*, Legal Times, Apr. 20, 1992, at 25.

In the face of deep and abiding differences over fundamentals, there is no coherent concept of religiously "neutral" laws; all laws necessarily reflect the religiously informed norms of the society. The only hope for a regime of religious freedom is a policy of pluralism, accommodation, and mutual forbearance. To be sure, the judiciary cannot police every conflict between majority will and minority faith. But if the courts articulate the constitutional standard so that legislatures and bureaucrats will understand that their power to interfere with religious life is constrained, courts need enforce the standard only occasionally. Constitutional litigation is the tip of the iceberg. The real power of this Court is to set the terms of engagement. The negative impact of *Smith* was not only on plaintiffs in court, but also on believers and

churches in negotiations with city hall. Religious communities suddenly lost their ability to rest their claims for decent consideration on any claim of right, and that has already made an enormous difference. The Court in *Smith* may have underestimated its own role in sustaining the traditions of tolerance that it relied on to protect religious minorities.

b. The historical meaning of free exercise. The *Smith* opinion did not refer to the historical record from the Framing period, which indicates that the concept of free exercise would likely have been understood to denote a substantive liberty rather than merely a nondiscrimination requirement.[10] Like most other provisions of the Bill of Rights,[11] the Free Exercise Clause constitutionalized a practice that had previously been a matter of common or statutory law. During the colonial and pre-constitutional periods, conflicts had sometimes arisen between the sincerely held religious beliefs of some Americans and the generally applicable laws of the colonies and states, and in response, accommodations or exceptions were made. Examples include exemptions from oath requirements,

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[10] *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990); Douglas Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. Rev. 591 (1991); Dep't of Justice, Office of Legal Policy, *Report to the Attorney General: Religious Liberty under the Free Exercise Clause* 1-31 (1986).

[11] *See County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1672 (1991) (Scalia, J., dissenting) (Fourth Amendment prohibition of unreasonable seizures was based on common law); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (interpreting Eighth Amendment excessive fines clause on the basis of the practices and understandings of the day).

mandatory tithes, certain aspects of family law, and – most significantly – military conscription. McConnell, *supra*, 103 Harv. L. Rev. at 1466-73.

The language of the pre-1789 state constitutions suggests that such exemptions had come to be understood as a matter of constitutional right. Twelve of the thirteen state constitutions contained provisions guaranteeing the free exercise of religion (or, as expressed in some, the "rights of conscience" or the freedom to worship), and eight of these did so in the form of a basic substantive guarantee coupled with a reservation of power in the state to override free exercise when necessary to protect the public peace and safety. This was the eighteenth century equivalent of the modern compelling interest test. Massachusetts, for example, provided that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, . . . provided he doth not disturb the public peace or obstruct others in their religious worship." Mass. Const. of 1780, art. II, reprinted in B. Poore, ed., 1 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 956, 957 (1878). Article 61 of the Georgia State Constitution of 1777 provided: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." *Id.* at 377, 383. For the other provisions, *see* McConnell, *supra*, 103 Harv. L. Rev. 1456-58.

The most plausible construction of these provisions is that they stated a substantive right of free exercise, limited by the power of the state to prevent injury to others. Certainly they contain no language that suggests that generally applicable laws interfering with the right to

worship would be legitimate. If free exercise guarantees were not read to exempt believers from "otherwise valid" laws, what was the purpose of the "peace and safety" provisos? This interpretation is confirmed by James Madison's comment that religious freedom would be protected "in every case where it does not trespass on private rights or the public peace." 9 *Writings of James Madison* 98, 100 (G. Hunt ed. 1901) (letter to Edward Livingston, July 10, 1822). Since the federal Free Exercise Clause was evidently modelled on the state precursors, and there is nothing in the legislative history of the federal provision that suggests a change in meaning,[12] the substantive interpretation of the Free Exercise Clause is the most persuasive.[13]

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[12] See *Browning-Ferris, supra,* 492 U.S. at 264 (since "at least eight of the original States which ratified the Constitution had some equivalent of the Excessive Fines Clause in their respective Declarations of Rights or State Constitutions, . . . the matter was not a likely source of controversy or extensive discussion").

[13] The history of adoption of the Fourteenth Amendment also demonstrates that the Framers of that Amendment, through which the First Amendment was applied to the states, understood the freedom of religion to be threatened by generally applicable laws. Their prime examples came from the black codes, which were not aimed specifically against religion, but had the effect of prohibiting its exercise. The principal draftsman of the Fourteenth Amendment, John Bingham, commented: "Before [the Fourteenth Amendment] a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or

(Continued on following page)

Moreover, changes since the founding have made it all the more vital to require the state to demonstrate a compelling reason if it is to override a sincere religious claim. Government at all levels is now far more intrusive than it was at the time of the founding. As one commentator has noted, "The style and scope of twentieth century government has led to its involvement with ends and values of varying importance." Donald Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee,* 80 Harv. L. Rev. 1381, 1388 (1967). In the days of the watchman state, there was little need for religious exemption; in the days of the regulatory state, there is every need. To regulate religion on the same basis as other activities is to brook deep and constant intermeddling by the state in matters of religion.

Daniel Carroll, a Member of the First Congress from Maryland, stated in the floor debate on the First Amendment: "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 *Annals of Congress* 757 (Aug. 15,

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break with him his crust of bread. . . . Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter can imitate the bad example of Georgia and send men to the penitentiary, as did that State for teaching the Indian to read the lessons of the New Testament, to know that new evangel, 'The pure in heart shall see God.' " *Cong. Globe,* 42d Cong., 1st Sess. 84 (app.) (1871). *See also Cong. Globe,* 39th Cong., 1st Sess. 474 (1865) (statement of Lyman Trumbull discussing effect on the right to preach of laws forbidding teaching slaves to read); *Cong. Globe,* 38th Cong., 1st Sess. 1199 (1863) (statement of James Wilson criticizing slavery for its "incessant, unrelenting, aggressive warfare upon . . . the purity of religion").

1789). The very visible and virtually omnipresent hand of governmental regulation is now dealing heavier blows on religion than Carroll or any of the Framers could ever have anticipated 200 years ago.

The spirit of the recent celebration of the bicentennial of the Bill of Rights makes this an apt time for the Court to restrain the governmental hand touching the rights of conscience, at least when the government acts as it did in Hialeah with such ill-disguised hostility toward a vulnerable religious minority. In the words of the Williamsburg Charter, "Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular communities." *The Williamsburg Charter*, reprinted at 8 J. Law & Relig. 5, 8 (1990).

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX A

Americans United for Separation of Church and State [Americans United] is a national non-profit organization committed to preserving religious liberty and the principle of separation of church and state. Americans United is composed of some 50,000 members of various religious beliefs and some of no religious affiliation residing throughout the United States. Although representing various religious and ethical perspectives, all Americans United members support the principles of religious freedom and equal treatment of all religious faiths before the law. Americans United members are currently involved in several religious liberty matters that will be directly affected by the ultimate decision in this case.

James E. Andrews, as the Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 3,000,000 members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods. At the outset, the Stated Clerk is compelled to make six statements: (1) The Church entirely rejects and has never participated in the practice of religious animal sacrifice. (2) Cruelty to animals is a serious matter. Indeed, as early as 1875, the General Assembly condemned all acts of cruelty to animals as "utterly abhorrent to the spirit of the gospel. . . . " (Minutes p. 510). In 1990, the General Assembly again addressed animal cruelty. The problem of animal cruelty is not, however, made worse by the proper carrying out of a religious animal sacrifice which are the facts in this case. (3) Animal sacrifice is an ancient religious practice

predating even Christianity, Islam, and Judaism. (4) The beliefs held by the Petitioners are sincerely held and are protected by the First Amendment. (5) The 200th General Assembly (1988) stated: "Churches have a right of autonomy protected by the Free Exercise clause of the First Amendment. Each worshipping community has the right to govern itself and order its life and activity free of government intervention. The government must assert a compelling interest and demonstrate an imminent threat to public safety before the right of autonomy may be set aside in specific instances and government permitted to interfere with internal church activities." *God Alone is Lord of the Conscience*, A Policy Statement Adopted by the General Assembly (1988) Presbyterian Church (U.S.A.) 16-17. (6) This case exemplifies the disturbing trend of courts to broadly misapply this Court's ruling in *Employment Division v. Smith* and, in so doing, to routinely and harshly burden the free exercise of religion guaranteed in the First Amendment. The Stated Clerk, therefore, urges this Court to address and rectify the broad misapplication of the *Smith* decision in this case and to provide correct guidance to other courts. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration by all the denomination's members.

The American Jewish Committee was founded in 1906 to protect the civil and religious rights of Jews. It is the American Jewish Committee's conviction that the

civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, the American Jewish Committee strongly supports a broad interpretation of the Free Exercise Clause of the First Amendment. One corollary of this principle is that only when justified by a compelling interest of society may the government bar a faith group from carrying out a practice dictated by its religious beliefs. It is our belief that government can never have a compelling interest in prohibiting for religious purposes an activity it permits for non-religious purposes. That is precisely the issue presented by the case at bar.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. It has litigated many cases arising under the Free Exercise Clause. Rituals play a large role in Judaism, and these rituals often run into conflict with the assumptions of the larger culture. Accordingly, it is important for the well being of Judaism that courts be able to scrutinize statutory enactments for both overt and subtle religious gerrymanders.

The Anti-Defamation League [ADL] of B'nai B'rith was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The ADL has always adhered to the principle that these goals and the general stability of our democracy are best served through the vigorous protection of the separation of church and state and through the right to the free exercise of religion. In support of this principle, the

League has previously filed briefs as a friend of the court in numerous cases dealing with the religious liberty clauses of the First Amendment. The League is able to bring to this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms. ADL also addresses this appeal because of deep concern that as a result of this Court's ruling in *Smith*, effectively discarding the thirty-year old "compelling state interest" test used to judge government restrictions on an individual's religious practice, the religious liberty of Americans is not adequately protected.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States and deals exclusively with issues pertaining to religious liberty and church-state separation. These organizations include: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various conventions and associations. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Catholic League for Religious and Civil Rights [League] is a nonprofit voluntary association, national in membership, which was organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is

committed to ensuring the American people's continued enjoyment of the strong protections afforded religious freedom by the Free Exercise Clause of the First Amendment; and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 4,500 Christian judges, attorneys, law professors and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. Both in this Court and in state and federal courts throughout the country the Center has advocated the importance of free exercise of religion as a fundamental and inalienable human right, and it has vigorously opposed governmental discrimination on the basis of religion.

The Church of Jesus Christ of Latter-Day Saints [LDS Church] is an unincorporated religious association with activities throughout much of the world. It has more than 4 million members and more than 9,000 congregations throughout the United States. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." Article of Faith No. 11, The Church of Jesus Christ of Latter-day Saints.

The Evangelical Lutheran Church in America was formed in 1988 by merger of three predecessor Lutheran church bodies that had each adopted as a policy statement, "The Nature of the Church and Its Relationship with Government," that declares opposition to "any attempt by government to curb religious liberty through criminal and/or administrative measures focused at groups, except in cases posing a grave and immediate threat to the public's health, safety, or welfare."

First Liberty Institute [FLI] at George Mason University is a non-profit educational institute established to promote principles of religious liberty and civic responsibilities in American education. In the spirit of the Williamsburg Charter, FLI affirms and encourages the civic framework of religious liberty – rights, responsibilities, and respect – as common core values essential for good citizenship. FLI works to secure the strongest possible protection for religious liberty, our nation's first liberty undergirding all other rights and freedoms guaranteed by the Bill of Rights.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, representing 7 million members worldwide. The Church joins the accompanying brief because it believes and has long taught that freedom of conscience must include not only the right to believe but also the right to express, advocate and bear witness to belief and that governmental neutrality towards religion is in the best interest of both religion and government, and of society at large. The Church also joins this brief to express its great concern and dismay over the serious erosion of religious freedom resulting from lower courts'

applications of *Smith*, and to urge the Court to restate that the protection given religiously motivated conduct must equal that extended to other activities by the Bill of Rights.

Home School Legal Defense Association [HSLDA] is a non-profit association dedicated to preserving the fundamental right of parents to remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. Formed in 1983, HSLDA provides legal defense for its 23,000 member-families nationwide that are schooling their children at home. Frequently, HSLDA defends these home school families by asserting their constitutional rights to free exercise of religion.

Mennonite Central Committee U.S. is the relief, service, development and advocacy agency of the Beachy Amish Mennonite, Brethren in Christ, Conservative Mennonite Conference, Evangelical Mennonite Church, General Conference Mennonite Church, Mennonite Church and Mennonite Brethren Church representing some 188,000 members in the U.S.

The National Association of Evangelicals [NAE] is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

People For the American Way [People For] is a non-partisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights. People For has been extremely concerned about the dangers to religious liberty posed by this Court's 1990 decision in *Smith*. People For seeks to participate as an *amicus* in this case because, even though the specific religious practices at issue are contrary to the religious or moral convictions of many members of People For, a decision by this Court affirming the rulings below would further threaten the religious freedom of all Americans.
